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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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Appellee contends (Br. 19–20) that the Government raises no issue "as to the applicable law," but is "asking this Court for a trial *de novo* on the record below in an antitrust proceeding * * * without anywhere in its papers specifying any particular finding or findings which are challenged as clearly erroneous"; and that we are seeking to have this Court apply the law "to a version of the facts wholly at variance with the specific findings of the trial court."

As pointed out in our main brief, however, the basic underlying facts, as found by the district court and as supplemented by uncontradicted evidence, are not in dispute. The dispute is whether, as the Government contends, these uncontradicted facts estab-

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lish that Parke Davis engaged in an illegal price-fixing conspiracy, or whether, as the district court held, they show only a unilateral refusal to deal. This presents a legal, not a factual question; or, at most, a mixed question of law and fact in which there is no controversy as to subsidiary evidentiary matters. The issue presented to this Court for determination is, therefore, one traditionally subject to appellate review and in no degree involves any intrusion upon the fact-finding functions of the trial court.

1. The trial court made 31 "Findings of Fact" (R. 31–39), many of which are lengthy and embody numerous subsidiary findings. A number of the findings contain conclusory statements that Parke Davis did not enter into any "agreement" with specified retailers or wholesalers, or with these two categories of customers generally. It is those portions of the findings that appellee primarily relies on to support the judgment below, and that it contends (Br. 22–42) "have not been shown to be clearly erroneous and should not be set aside" (Br. 22).

These statements, however, are not "findings of fact" in the sense that they constitute the court's resolution of disputes with respect to, or its determination of, the underlying facts. Indeed, as appellee's brief itself indicates, there is no real dispute with respect to what Parke Davis did. These statements merely embody the court's ultimate conclusion as to the legal significance of those facts, *i.e.*, that, as a matter of law, the undisputed facts do not establish a conspiracy. Since we think that this holding mis-

applied the law, we necessarily reject the notion that this Court is bound by, and must accept, those portions of the findings which embody these erroneous legal conclusions. Specifically, we challenge, as reflecting errors of law, the next to the last sentence in finding 12 (R. 33), the last sentence in finding 14 (R. 34), the last sentence in finding 17 (R. 35), the last sentence in finding 19 (R. 35), the next to the last sentence in finding 22 (R. 36), and the last sentences in findings 23 and 28 (R. 36–37, 38). For the convenience of the Court, we have set forth in an appendix the foregoing findings, with the challenged portions italicized.

2. Apart from these conclusory statements, we challenge only part of one sentence of one finding dealing with the substantive issues, and part of one finding dealing with the need for relief. Since another substantive finding may be ambiguous, we challenge it to whatever extent it may be contrary to the undisputed facts of record. Of course, we also rely upon other undisputed facts which the trial court did not refer to in its findings.

a. We challenge that portion of the second sentence of finding 10 (R. 32), that states that Parke Davis did not "in any other manner police its suggested minimum prices in either the District of Columbia or Virginia." The policing point is discussed in our main brief in note 22, page 33.

b. We challenge those portions of finding 27, which deals with the likelihood of resumption of Parke Davis' resale price maintenance attempts, that are set

out below.[3] The lack of any evidentiary support for the trial court's conclusion that there is no reasonable probability that appellee would resume its resale price-fixing activities is discussed at pages 41 to 47 of our main brief.

c. We argued (Br. 24–29) that the record showed that, in its visits to individual retailers and wholesalers, Parke Davis told them that it was also approaching other retailers and wholesalers with respect to price-cutting and advised some as to the proposed actions of others; and that the trial court therefore erred in stating in its opinion (R. 29) that "every visit made by the [Parke Davis] representatives to the retailers and wholesalers was, to each of them, separate and apart from all others." Appellee does not deny that its representatives advised the retailers and wholesalers that it was thus contacting other customers. To whatever extent finding 31 may represent the contrary view, we challenge it.

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[3] The challenged portions of finding 27 read:

> In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell. * * * There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia [R. 37–38].

Finding 31 states:

> There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more than one

3. The Government, therefore, is not seeking a trial *de novo* of contested factual issues, but only a determination of the proper legal conclusions to be drawn from uncontested facts. For there is no dispute as to what Parke Davis actually did in its "attempt to maintain retail prices in the areas in question" (Appellee's Br. 14). Appellee does not, nor could it on this record, deny that it cut off the price-cutting retailers and induced its wholesalers to do so; that in its repeated visits to the retailers and wholesalers it advised them that it was also contacting other retailers and wholesalers and that they were cooperating; and that it resumed selling to the cut-off retailers, and permitted its wholesalers to do so, only after they had undertaken to stop, and had stopped, their cut-price advertising. Its argument is that, despite these facts, no conspiracy was shown because, during its campaign to coerce the retailers and wholesalers into complying with its resale maintenance policies in non-"fair trade" areas, Parke Davis studiously refrained from seeking express "agreements" to maintain prices; and instead purported merely to inform its customers one at a time of its policy as to the terms upon which it would deal with them. Appellee concedes (Br. 57), however, that the legality of its actions does not turn on "whether the witness used the word 'agreed' or a similar term." The crucial question, necessarily, is the legal significance of what it

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wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer [R. 39].

did. As shown in our main brief, Parke Davis' actions went far "beyond the exercise of this right [to refuse unilaterally to deal], and by contracts or combinations, expressed or implied, unduly hinder[ed] or obstruct[ed] the free and natural flow of commerce in channels of interstate trade". *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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APPENDIX

Findings in Which the Government Challenges the Court's Legal Conclusion That There Was No Agreement

(Challenged portions are italicized) (R. 33-37, 38)

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit. This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws. At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company. Upon the basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia, and upon his return he instructed his assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer. *Parke, Davis did not*

seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences. These instructions were carried out in July, 1956.

* * * * *

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. *There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject.*

* * * * *

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows. Parke, Davis then resumed selling its products to each of these retailers, and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. *Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers.*

* * * * *

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples. *Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.*

* * * * *

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing. From time to time, Drug Mart advertised cut prices on Parke, Davis products. Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued, and Drug Mart in fact discontinued such advertising for a period of several months. There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount. *Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.* The evidence shows that each member store of the organization was free to charge whatever prices it wished and to ad-

vertise as it wished, regardless of whether there was any joint advertising of Parke, Davis products.

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it. Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis. When it again advertised Parke, Davis refused to sell. Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter. At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them. *Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them.*

* * * * *

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis. The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to

them and they desired to continue as customers of Parke, Davis. *There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.*